


## THE FINAL ACT: EXPLORING THE END OF PANDEMICS

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### ABSTRACT

*This Essay considers how adjudicators could determine the end of the SARS-Cov-2 pandemic. Considerable work examines the beginning and existence of pandemics and emergencies. By contrast, when either of these two phenomena end remains underexplored—creating legal uncertainty. This Essay reviews how pandemics as biological and social events end, considers how international bodies have approached the end of emergencies, and assesses what this might mean for adjudicators deciding on the end of the SARS-Cov-2 pandemic and related public health emergency.*

### I. INTRODUCTION

In law, emergencies that justify exceptional powers, *require* a precise start and an end date.<sup>1</sup> Limitations and derogations from human rights obligations<sup>2</sup> and defenses in treaty or customary international law<sup>3</sup> provide cover only as long as the underlying emergencies last. These flexibility-enhancing escape mechanisms<sup>4</sup> are time-limited. Once the emergency ends, states must resume compliance with their obligations. For adjudicators, it is thus crucial to be able to identify a precise moment in time when an emergency began and when it finished.

“As a social phenomenon,” said historian Charles Rosenberg, “an epidemic has a dramatic form. Epidemics start at a moment in time, proceed on a stage limited in space and duration, follow a plot line of increasing and revelatory tension, move to a crisis of individual and collective character, then drift toward closure.”<sup>5</sup> Their final act varies,

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<sup>1</sup> OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 323 (2006) (“whether and when an emergency ceases to be such and is transformed into something else”).

<sup>2</sup> Emilie M. Hafner-Burton, Laurence R. Helfer & Christopher J. Fariss, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, 65 *INT’L ORG.* 673, 674 (2011).

<sup>3</sup> *E.g.*, Articles on the Responsibility of States for Internationally Wrongful Acts, Arts. 20–25, Annexed to GA Res. 56/83 (Dec. 12, 2001), GAOR 56th Sess. Supp. 49, Vol. 1, 499; CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, paras. 379–82 (May 12, 2005).

<sup>4</sup> BARBARA KÖREMENOS, *THE CONTINENT OF INTERNATIONAL LAW: EXPLAINING AGREEMENT DESIGN*, at ch. 5 (2016); KRZYSZTOF J. PELC, *MAKING AND BENDING INTERNATIONAL RULES: THE DESIGN OF EXCEPTIONS AND ESCAPE CLAUSES IN TRADE LAW* (2016).

<sup>5</sup> Charles Rosenberg, *What Is an Epidemic? AIDS in Historical Perspective*, 118 *DAEDALUS* 1, 2 (1989).

however.<sup>6</sup> Some “end with a whimper.”<sup>7</sup> Others, like the second plague pandemic, ended with “a series of epidemic bangs in different places and at different times.”<sup>8</sup> Some others still, like SARS, “mysteriously” disappear.<sup>9</sup> The end of epidemics/pandemics may also be a matter of perspective. On the disappearance of the second plague pandemic, the historian Christian McMillen noted that “[w]hen looked at across the early modern world, plague appears to have gradually petered out . . . . But when looked at locally or at the country level, it appears to have disappeared suddenly.”<sup>10</sup>

These observations underscore the difficulty of pinpointing a specific date when a pandemic or epidemic ends. Pandemics are biological events, but they are also social events, as Rosenberg’s quote above shows. The two are intertwined but their ends need not be so. The pandemic may end biologically, and yet not end socially. Or it might end socially, but not biologically, as Part II explains. Legally, such asynchronous endings can be problematic.

This Essay focuses on the “final act” and considers how adjudicators may determine when the SARS-Cov-2 pandemic and related emergency end. Considerable work examines the *beginning* and *existence* of pandemics and emergencies. By contrast, as we will show, the question of when these two phenomena *end* remains underexplored—creating legal uncertainty. Part II reviews how pandemics as biological and social events end. Part III considers how international bodies, in particular the World Health Organization (WHO) and international courts and tribunals, have approached the end of emergencies. Part IV assesses what this might mean for the end of the SARS-Cov-2 pandemic and concludes.

## II. BEGINNINGS AND ENDS

Scientists and historians have paid much attention to determining the *beginning* of epidemics, despite debates about the usefulness of identifying “patient zero.”<sup>11</sup> As difficult as it may be to identify the beginning of the epidemic, determining when an epidemic ends is more difficult still. According to historian Robert Peckham, “[w]hile the emphasis in the scientific and popular literature tends to be on the process of ‘emergence’—on a virus’s sudden visibility—much less attention is paid to the reverse process of *de*-emergence (or ‘disappearance’).”<sup>12</sup> And yet, a persistent question during the present pandemic has been “when will it end?” This seemingly simple question can be disaggregated into, at least, two different questions: “When will the biological phenomenon of this epidemic resolve?” and “[w]hen, if ever, will the disruption to our

<sup>6</sup> Jeremy A. Greene & Dora Vargha, *How Epidemics End*, BOSTON REV. (June 30, 2020), at <https://bostonreview.net/science-nature/jeremy-greene-dora-vargha-how-epidemics-end>.

<sup>7</sup> Rosenberg, *supra* note 5, at 2.

<sup>8</sup> Paul Slack, *The Disappearance of Plague: An Alternative View*, 34 ECON. HIST. REV. 469, 473 (1981).

<sup>9</sup> Marilyn J. Roossinck, *The Mysterious Disappearance of the First SARS Virus, and Why We Need a Vaccine for the Current One But Didn’t for the Other*, CONVERSATION (May 5, 2020), at <https://theconversation.com/the-mysterious-disappearance-of-the-first-sars-virus-and-why-we-need-a-vaccine-for-the-current-one-but-didnt-for-the-other-137583>.

<sup>10</sup> CHRISTIAN McMILLEN, PANDEMICS: A VERY SHORT INTRODUCTION 23 (2016).

<sup>11</sup> Richard McKay, *Patient Zero: Why It’s Such a Toxic Term*, CONVERSATION (Apr. 1, 2020), at <https://theconversation.com/patient-zero-why-its-such-a-toxic-term-134721>.

<sup>12</sup> Robert Peckham, *After the End of Disease: Where Has SARS Gone? The Strange Case of the Disappearing Coronavirus*, SOMATOSPHERE (June 8, 2016), at <http://somasphere.net/2016/where-has-sars-gone-the-strange-case-of-the-disappearing-coronavirus.html>.

social life caused in the name of coronavirus come to an end?”<sup>13</sup> In this Part we consider both of these questions and show how they do not necessarily have the same answer.

There is no clear and uncontested definition of the term “pandemic.” Yet, to understand when it ends, it is necessary to know what it *is*. Every pandemic “begins as a perhaps unrecognized outbreak that in turn leads to an epidemic.”<sup>14</sup> Outbreaks, epidemics, and pandemics do not differ in kind. They differ in degree. An outbreak is “a noticeable, often small, increase over the expected number of cases” of a disease within a defined period of time, place, and population.<sup>15</sup> An epidemic, in turn, is a bigger increase in the incidence of a disease in a given place at a given time, above the level normally anticipated for that place at that time.<sup>16</sup> A pandemic is an epidemic spread across regions/continents.<sup>17</sup> To be sure, these definitions are, to some extent, arbitrary and their usage is inconsistent.<sup>18</sup> Yet they can help to illuminate some problems about how pandemics end. If pandemics are cross-border epidemics, then pandemics can be conceptualized as a collection of national epidemics. By implication, an epidemic may end in one country, even as the pandemic continues. For example, in June 2020 New Zealand brought cases of COVID down to zero before incoming travelers reintroduced the virus.<sup>19</sup> This also applies in reverse: a pandemic may be over, even though significant outbreaks in specific countries continue to occur. Thus, in the case of the H1N1 pandemic of 2009, the WHO explained that “[i]n the post-pandemic period, cases and outbreaks due to the H1N1 (2009) virus are expected to continue to occur.”<sup>20</sup>

Biologically, a first way for epidemics to end is when the disease is eradicated. Eradication is difficult and unlikely, as it requires a combination of factors, which, depending on the disease, may include the availability of a vaccine creating complete and long-lasting immunity and no remaining living hosts (human or animal) for the pathogen.<sup>21</sup> Of human diseases, only smallpox has so far been eradicated.<sup>22</sup>

<sup>13</sup> Greene & Vargha, *supra* note 6.

<sup>14</sup> PETER C. DOHERTY, PANDEMIC: WHAT EVERYONE NEEDS TO KNOW 49 (2013).

<sup>15</sup> Rebecca S. B. Fischer, *What's the Difference Between Pandemic, Epidemic and Outbreak?*, CONVERSATION (Mar. 9, 2020), at <https://theconversation.com/whats-the-difference-between-pandemic-epidemic-and-outbreak-133048>.

<sup>16</sup> WHO, Definitions: Emergencies, at <https://www.who.int/hac/about/definitions/en>. “A disease can occur both as an epidemic or an endemic, depending on the relative number of cases. For example, consider a hypothetical locality with a population of 100,000 where the monthly incidence of gastrointestinal diseases in July and December is about 900 and 130, respectively. The occurrence of 1,400 cases of gastrointestinal diseases in July of a given year would be considered an epidemic, whereas the occurrence of 150 cases in December would constitute an endemic. On the other hand, the occurrence of a single case of a communicable disease, which is absent for a long period of time from the given area or population, may be labeled an epidemic.” PRAKASH S. BIEN & RUCHIKA RAGHUVANSHI, EMERGING EPIDEMICS: MANAGEMENT AND CONTROL 25 (2013).

<sup>17</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, PRINCIPLES OF EPIDEMIOLOGY IN PUBLIC HEALTH PRACTICE: AN INTRODUCTION TO APPLIED EPIDEMIOLOGY AND BIostatISTICS 14 (3rd ed. 2012) (“epidemic occurring over a widespread area (multiple countries or continents) and usually affecting a substantial proportion of the population”).

<sup>18</sup> DOHERTY, *supra* note 14, at 49.

<sup>19</sup> *New Zealand's First COVID Cases in 24 Days Came From the UK*, BBC NEWS (June 16, 2020), at <https://www.bbc.co.uk/news/world-asia-53059633>.

<sup>20</sup> WHO Press Release, What Is Post-Pandemic (Aug. 10, 2010), at [https://www.who.int/csr/disease/swineflu/frequently\\_asked\\_questions/post\\_pandemic/en](https://www.who.int/csr/disease/swineflu/frequently_asked_questions/post_pandemic/en).

<sup>21</sup> BIEN & RAGHUVANSHI, *supra* note 16, at 25.

<sup>22</sup> WHO Press Release, The Smallpox Eradication Programme – SEP (1966–1980) (May 2010), at <https://www.who.int/features/2010/smallpox/en>.

Second, absent eradication, epidemics may end through wide spread of the pathogen: the epidemic ends when the pathogen can no longer infect because the population, or a sufficient proportion of it, is no longer susceptible to the disease. This can be a devastating way for the epidemic to end. Third, epidemics may end through containment of the disease,<sup>23</sup> by application of a combination of pharmacological and public health measures. Containment measures bring the number of infections down to the normal level of transmission that would be expected for that disease in a particular place at a particular time. Infectious cases remain in the community, but surveillance and monitoring keeps these numbers manageable.<sup>24</sup> For instance, Ebola epidemics end when no confirmed or probable cases are detected for a period of forty-two days since the last potential exposure to the last case of Ebola occurred.<sup>25</sup> The containment measures will vary from disease to disease, and from place to place: no two epidemics are the same.<sup>26</sup> Fourth, epidemics may end once a different level of transmission (perhaps an increased one) is accepted as the new normal.

In the case of pandemics caused by a new virus, there is no normal range of transmission in a given place at a given time. Similarly, there is little knowledge about the virus and the disease it causes. These factors complicate the determination of when the pandemic ends. Some infectious diseases become endemic or seasonal. The A(H1N1)pdm09 virus, which caused the 2009 influenza pandemic, continues to circulate as a seasonal flu strain.<sup>27</sup> A certain level of transmission of this disease is now the new normal. This pandemic has ended, even though the virus has not disappeared.<sup>28</sup> Other pathogens just disappear. The WHO declared the SARS epidemic over twenty days after the last reported case, though with the important caveat that SARS continues to “threaten the world.”<sup>29</sup> The threat of reinfection remained latent—though no new cases have been reported since 2004.<sup>30</sup> Other pandemics do not end, even as the disease becomes treatable. The HIV/AIDS pandemic has not yet ended: there remain country-wide epidemics in some states, like South Africa, and more regionally localized ones in others, like in the United States.<sup>31</sup>

<sup>23</sup> Dora Vargha, *After the End of Disease: Rethinking the Epidemic Narrative*, SOMATOSPHERE (May 17, 2016), at <http://somatosphere.net/2016/after-the-end-of-disease-rethinking-the-epidemic-narrative.html>.

<sup>24</sup> Luisa Salomón, *¿Cómo Terminan las Epidemias?*, PRODAVINCI (May 20, 2020), at <https://epidemias.prodavinci.com>.

<sup>25</sup> WHO Press Release, WHO Recommended Criteria for Declaring the End of the Ebola Virus Disease Outbreak (Mar. 4, 2020), at <https://www.who.int/publications/m/item/who-recommended-criteria-for-declaring-the-end-of-the-ebola-virus-disease-outbreak>.

<sup>26</sup> At least, in the case of influenza epidemics. JONATHAN VAN TAM & CHLOE SELLWOOD, INTRODUCTION TO PANDEMIC INFLUENZA (2010).

<sup>27</sup> Richard Pebody, *Why “Swine Flu” Is Now Considered a Normal, Seasonal Flu Strain*, NHS PUB. HEALTH MATTERS BLOG (Jan. 28, 2016), at <https://publichealthmatters.blog.gov.uk/2016/01/28/why-swine-flu-is-now-considered-a-normal-seasonal-flu-strain>.

<sup>28</sup> WHO Press Release, WHO Director-General Declares H1N1 Pandemic Over (Aug. 10, 2010), at <https://www.euro.who.int/en/health-topics/communicable-diseases/influenza/news/news/2010/08/who-director-general-declares-h1n1-pandemic-over>.

<sup>29</sup> WHO Press Release, SARS Outbreak Contained Worldwide (July 5, 2003), at <https://www.who.int/media-centre/news/releases/2003/pr56/en/>

<sup>30</sup> Centers for Disease Control and Prevention, *SARS (10 Years After)* (Mar. 3, 2016), at <https://www.cdc.gov/dotw/sars/index.html>.

<sup>31</sup> Robert W. Eisinger & Anthony S. Fauci, *Ending the HIV/AIDS Pandemic*, 24 EMERGING INFECTIONS DISEASES 413 (2018).

Biological epidemics may also be accompanied by social epidemics: these involve the responses, individual and collective, of a given society to the biological phenomenon including public health measures, as well as individual preventive measures. Social pandemics may end when, among others, fear about the disease wanes.<sup>32</sup> As the director-general of WHO (DG) noted, pandemic “is a word that, if misused can cause unreasonable fear, or unjustified acceptance that the fight is over, leading to unnecessary suffering or death.”<sup>33</sup> Lawrence Gostin emphasized that “panic” is literally in the word “pandemic.”<sup>34</sup> Once the disease is better understood, relatively successful treatments are available, or public health institutions are adequately equipped, the population, or a section of it, may no longer fear the disease and return to their normal lives.<sup>35</sup> When the social epidemic ends before the biological epidemic, it can be “very, very messy.”<sup>36</sup> At the same time, epidemics of fear can persist even after a biological pandemic ended.<sup>37</sup>

### III. MESSY ENDS AND THEIR LEGAL IMPLICATIONS

The end of the biological and social pandemics can be asynchronous. They may, and do, happen at different points in time. The biological pandemic may end, but the social pandemic may not because fear of the disease remains. Or the social pandemic may end, but not the biological one. This asynchronicity raises a central legal question: when is the (public health) *emergency* caused by the SARS-Cov-2 pandemic over, for legal purposes?

The approach of different international bodies for determining the end of emergencies has varied. We first consider how the WHO assesses the existence (and the end) of emergencies under the International Health Regulations (IHR), namely Public Health Emergencies of International Concern (PHEIC); second, how human rights bodies determine the existence (and end) of emergencies for the purpose of derogations; and, third, how investment tribunals set the end of emergencies for the purposes of the plea of necessity in customary law. This Part gives a flavor of the different approaches of international institutions and brings to the surface the legal difficulties that may lay ahead for COVID-19 claims.

#### A. WHO: *The End of PHEICs*

Under the IHR, the WHO can declare PHEICs. A PHEIC is an “extraordinary event which . . . (i) constitute[s] a public health risk to other states through the international spread of

<sup>32</sup> McMILLEN, *supra* note 10, at 4.

<sup>33</sup> WHO Director-General’s Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), at <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19—11-march-2020>.

<sup>34</sup> Amy McKeever, *Coronavirus is Officially a Pandemic. Here’s Why that Matters*, NAT’L GEOGRAPHIC (Mar. 11, 2020), at <https://www.nationalgeographic.com/science/2020/02/how-coronavirus-could-become-pandemic-and-why-it-matters>.

<sup>35</sup> Karl Taro Greenfeld, *When SARS Ended*, NEW YORKER (Apr. 17, 2020), at <https://www.newyorker.com/culture/personal-history/when-sars-ended>.

<sup>36</sup> Gina Kolata, *How Pandemics End*, N.Y. TIMES (May 10, 2020), at <https://www.nytimes.com/2020/05/10/health/coronavirus-plague-pandemic-history.html>.

<sup>37</sup> Nidal Moukaddam, *Fears, Outbreaks, and Pandemics: Lessons Learned*, PSYCH. TIMES (Nov. 15, 2019), at <https://www.psychiatrytimes.com/view/fears-outbreaks-and-pandemics-lessons-learned>; see also Susan L. Murray, *Fear and the Front Line*, 382 NEW ENGLAND J. MED. 1785 (May 7, 2020).

disease, and (ii) . . . potentially require[s] a coordinated international response.”<sup>38</sup> This is a malleable concept, and there is no rulebook on declaring PHEICs.<sup>39</sup> Although the Emergency Committee (EC) provides scientific advice, the DG declares PHEICs—an “inherently political exercise.”<sup>40</sup> While PHEICs are temporary, they can be long. The DG declared the polio PHEIC in 2014 and it continues in its sixth year.<sup>41</sup> The PHEIC declaration triggers the WHO’s power to issue temporary recommendations to states. They expire after three months, and seek to balance the goals of preventing or reducing the spread of disease and of unnecessary interference with international traffic.<sup>42</sup> The WHO can extend them for up to two years in total,<sup>43</sup> after which the World Health Assembly can adopt them as standing recommendations.<sup>44</sup> In applying these temporary recommendations, states can choose to do more (or less).<sup>45</sup>

The DG also has the power to determine that a PHEIC has ended,<sup>46</sup> again with scientific input from the EC. In the WHO’s practice, the DG “invites” the World Health Assembly to “note” reports about the declaration, extension or ending of PHEICs.<sup>47</sup> To date, the DG has ended three PHEICs on advice of the EC (swine flu in 2010, Ebola and Zika in 2016). In the case of Zika, the DG declared that the PHEIC ended after ten months even though clusters of cases continued and the Zika virus remained “a significant enduring public health challenge requiring intense action.”<sup>48</sup> The DG can also extend temporary recommendations even after the PHEIC ended,<sup>49</sup> as in the case of Zika.<sup>50</sup> Given their importance, the termination of PHEICs and their potential legal consequences call for future research.

<sup>38</sup> International Health Regulations, at 22 n. 114, May 23, 2005, 2509 UNTS 79 [hereinafter IHR].

<sup>39</sup> IHR Article 12(4) lists five factors for determining whether an event constitutes a pandemic. J. Benton Heath, *Global Emergency Power in the Age of Ebola*, 57 HARV. INT’L L.J. 1, 27 (2016).

<sup>40</sup> *Id.* at 14; *cf. also* CHRISTIAN KREUDER-SONNEN: EMERGENCY POWERS OF INTERNATIONAL ORGANIZATIONS: BETWEEN NORMALIZATION AND CONTAINMENT 153, 168, 180 (2019).

<sup>41</sup> Including COVID, the WHO has declared six PHEICs to date. The Polio PHEIC was first announced on May 5, 2014 and last extended in April 2020. WHO Press Release, Statement on the Meeting of the International Health Regulations Emergency Committee Concerning the International Spread of Wild Poliovirus (May 5, 2014), at <https://www.who.int/mediacentre/news/statements/2014/polio-20140505/en>; WHO Press Release, Statement of the Twenty-Fourth IHR Emergency Committee (Apr. 8, 2020), at <https://www.who.int/news-room/detail/08-04-2020-statement-of-the-twenty-fourth-ihr-emergency-committee>. Zika lasted from Feb. 1, 2016 until Nov. 18, 2016. ECDC Press Release, WHO Ends Zika as a Public Health Emergency of International Concern (Nov. 23, 2016), at <https://www.ecdc.europa.eu/en/news-events/who-ends-zika-public-health-emergency-international-concern>.

<sup>42</sup> IHR, *supra* note 38, Art. 15(2).

<sup>43</sup> *Id.* Art. 15(3).

<sup>44</sup> *Id.* Art. 16.

<sup>45</sup> Eyal Benvenisti, *The WHO – Destined to Fail?: Political Cooperation and the COVID-19 Pandemic*, 114 AJIL 588.

<sup>46</sup> IHR, *supra* note 38, Arts. 12(5), 48(1)(b), 49(6).

<sup>47</sup> *E.g.*, WHO, Annual Report on the Implementation of the International Health Regulations (2005): Report by the Director-General, WHO Doc. A73/14, 9 (May 12, 2020); WHO, Polio Eradication: Report by the Director-General, WHO Doc. A73/12, 7 (May 5, 2020).

<sup>48</sup> WHO Press Release, Fifth Meeting of the Emergency Committee Under the International Health Regulations (2005) Regarding Microcephaly, Other Neurological Disorders and Zika virus (Nov. 18, 2016), at [https://www.who.int/news-room/detail/18-11-2016-fifth-meeting-of-the-emergency-committee-under-the-international-health-regulations-\(2005\)-regarding-microcephaly-other-neurological-disorders-and-zika-virus](https://www.who.int/news-room/detail/18-11-2016-fifth-meeting-of-the-emergency-committee-under-the-international-health-regulations-(2005)-regarding-microcephaly-other-neurological-disorders-and-zika-virus) [hereinafter Fifth EC Meeting].

<sup>49</sup> IHR, *supra* note 38, Art. 15; LAWRENCE O. GOSTIN, GLOBAL HEALTH LAW 195 (2014).

<sup>50</sup> Fifth EC Meeting, *supra* note 48.



### B. Derogations in Human Rights Law

Most human rights treaties allow for derogations in case of emergencies.<sup>51</sup> These derogations require some form of proclamation in domestic law, as well as international notification, and are temporally limited.<sup>52</sup> In practice, states often maintain derogations for extended periods.<sup>53</sup> Two features of the practice of human rights treaty bodies in relation to emergencies in general (rather than public health emergencies specifically) are interesting. We focus on the European Court of Human Rights (ECtHR) and the Human Rights Committee (HRC), as they take different approaches and exemplify the diversity of practice.

First, the ECtHR judicially reviews the existence of an emergency and has, in at least one instance, found it to be wanting.<sup>54</sup> However, the Court tends to defer to the assessment of state authorities.<sup>55</sup> The HRC takes a stricter approach: it has scrutinized justifications for derogations carefully and objectively.<sup>56</sup> Neither body has been called to assess the end of an emergency, but it is reasonable to assume they will each follow their respective approach. After all, whether an emergency has ended is the obverse of its existence. States are thus likely to have more leeway and be given a strong benefit of the doubt within the European system.<sup>57</sup> This said, there is no indication as to what factors either body will take into account in determining *when* an emergency ended.

Second, on the temporary character of derogations, the HRC takes the view that derogations are only allowed while an emergency lasts.<sup>58</sup> The ECtHR has never explicitly incorporated the requirement that the emergency be temporary.<sup>59</sup> Furthermore, the Council of Europe has noted that certain measures may continue after the end of the emergency, so long as their extension “fall[s] within the competence of parliament through the ordinary procedures.”<sup>60</sup> This seems compatible with the ECtHR’s view of derogations as preemptive measures available to deal with threats: while the current emergency may have ended, the

<sup>51</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocols No. 11 and No. 14 (European Convention on Human Rights (ECHR)), Art. 15, Nov. 4, 1950, ETS; 5 International Covenant on Civil and Political Rights, Art. 4, Dec. 16, 1966, 999 UNTS 171; American Convention on Human Rights, Art. 27, Nov. 22, 1969. On which, see HUMAN RIGHTS IN EMERGENCIES, at chs. 2–3 (Evan J. Criddle ed., 2016); GROSS & AOLÁIN, *supra* note 1, ch. 5; Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT’L L. 281 (1977); UN Human Rights Committee (HRC), CCPR General Comment No. 29: Article 4: Derogations During a State of Emergency, UN Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter GC29].

<sup>52</sup> GC29, *supra* note 51, para. 1.

<sup>53</sup> For example, the UK’s derogations to the ECHR in relation to the Northern Irish conflict from 1969 until 2001. WILLIAM A. SCHABAS, EUROPEAN CONVENTION OF HUMAN RIGHTS: A COMMENTARY 597 (2015).

<sup>54</sup> Denmark, Norway, Sweden and the Netherlands v. Greece, App. Nos. 3321/67, 3322/67, 3323/67, and 3344/67, Commission Report paras. 143–44 (Nov. 5, 1969).

<sup>55</sup> Alan Greene, *Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights*, 12 GER. L.J. 1764, 1774 (2011).

<sup>56</sup> GC29, *supra* note 51, para. 6; UN Human Rights Committee, *Landinelli Silva v. Uruguay*, 130, para. 8.3, Comm. No. 34/1978, UN Doc. Supp. No. 40 (A/36/40) (Apr. 8, 1981).

<sup>57</sup> SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 922 (2013).

<sup>58</sup> GC29, *supra* note 51, para. 2.

<sup>59</sup> ECtHR, *Guide on Article 15 of the European Convention on Human Rights*, para. 10 (Dec. 31, 2019), available at [https://www.echr.coe.int/Documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf).

<sup>60</sup> Council of Europe, *Respecting Democracy, Rule of Law and Human Rights in the Framework of the COVID-19 Sanitary Crisis: A Toolkit for Member States, Information Documents, SG/Ing(2020)11*, at 3 (Apr. 7, 2020).

threat it poses may remain latent.<sup>61</sup> The HRC has not pronounced on this issue, but given its “robust approach” to overseeing derogations,<sup>62</sup> it is less likely to leave room for maneuver to states.

### C. *Necessity in Investment Law*

Investment tribunals were called to assess the end of emergencies in the context of Argentina’s financial crisis in 2001. These tribunals carried out their own assessment of whether the emergency ended and granted limited deference to states. Indeed, the tribunals gave little weight to the continuation of the (declared) domestic emergency.

In *Urbaser*, Argentina’s domestic state of emergency continued when the province of Buenos Aires terminated the contract with the investor in July 2006. *Urbaser* underscored the discrepancy between the state of the Argentine economy and the de facto permanence of the state of emergency.<sup>63</sup> Adopting an objective standard, the tribunal accepted the investor’s argument that Argentina’s crisis ended in “mid-2003, when the gross domestic product (GDP) increased and stood almost at its pre-crisis level.”<sup>64</sup>

Similarly, the *LG&E* tribunal distinguished between “legislative” emergency and “factual” emergency (on which the tribunal relied). The tribunal accepted that the legislative emergency commenced with the Emergency Law of 2002, and that it would, therefore, end with the repeal of this law.<sup>65</sup> The legislative emergency, in other words, coincided with the period during which the Emergency Law was in force.<sup>66</sup> The factual emergency, by contrast, started on December 1, 2001 when Argentina introduced strict limits on withdrawals of deposits and ended on April 26, 2003 with the transition from Eduardo Duhalde’s to Nestor Kirchner’s administration. The Tribunal explained that “once the situation has been overcome, i.e. certain degree of stability has been recovered,” the emergency triggering the plea of necessity was no longer available.<sup>67</sup>

Even though these two tribunals adopted roughly the same date for the end of the emergency, their parameters differed: the *Urbaser* tribunal relied on an economic parameter (return to pre-crisis GDP), whereas the *LG&E* tribunal relied on a political one.

## IV. THE ENDS OF THE SARS-COV-2 PANDEMIC AND INTERNATIONAL LAW

The ends of pandemics can be messy, and so are the existing approaches to assessing the end of emergencies. The WHO is guided by scientific evidence in declaring the end of a PHEIC, and while this is ultimately a political decision, it is based on scientific advice of the EC. The ECtHR, in turn, leaves a margin of appreciation to states in determining the existence of emergencies that trigger derogations—an approach that it will likely adopt for

<sup>61</sup> *A. and Others v. the United Kingdom*, App. no. 3455/05, para. 177 (Eur. Ct. H.R. Feb. 19, 2009).

<sup>62</sup> Sarah Joseph, *Human Rights Committee: General Comment 29*, 2 HUM. RTS. L. REV. 81, 86 (2002).

<sup>63</sup> *Cf. also CMS*, *supra* note 3, paras. 379–82 (“the crisis had been evolving toward normalcy over a period of time”).

<sup>64</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, para. 666 (Dec. 8, 2016).

<sup>65</sup> *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, para. 227 (Oct. 3, 2006).

<sup>66</sup> *Id.*, para. 228.

<sup>67</sup> *Id.*, para. 261.



the end as well. The HRC and investment tribunals, like the WHO,<sup>68</sup> determine the existence and end of emergencies objectively, while granting little deference to governments. At the same time, their case-by-case approach leads to fragmentation.<sup>69</sup> As a result of this varied practice, it is uncertain whether, to what extent and with respect to which measures adjudicators will defer to national governments, or perhaps the WHO, in determining the end of the SARS-Cov-2 pandemic and related emergency.

Such variety is, perhaps, to be expected given the fuzzy and porous boundaries between normality and emergency—for, what is normality, after all? The standard model is one where emergency is time-limited, and normality is reestablished through measures that are intended to overcome the emergency.<sup>70</sup> Yet some emergencies become institutionalized, even permanent.<sup>71</sup> Thus, a bright-line distinction between normalcy and emergency may not always be possible. When applied to the SARS-Cov-2 pandemic, the boundary between normality and emergency indeed breaks down: our (prior) normality was one where there were *no cases* of COVID.

Medically, and perhaps socially as well, that normality is unlikely to return any time soon, even as the national legislative emergencies end and states reopen.<sup>72</sup> As explained above, one way for a pandemic to end is by adjustment of the “normal” range of disease in a particular place, at a particular time of year. In ending the Zika PHEIC, the WHO acknowledged such a new normality. Zika remained a significant concern, but a “longer-term response mechanism,” and not mere temporary measures, was necessary to deliver the objectives identified in the Zika Strategic Response Plan.<sup>73</sup> If COVID-19 becomes endemic or seasonal, the prior baseline of epidemiological normality will eventually change, and what were once emergency measures may no longer be justified or may, perhaps, need to become entrenched—emergency measures, that is, will need to be normalized. This process may be gradual and patchy.

International adjudicators currently lack the tools to deal with long-term emergencies and their messy ends.<sup>74</sup> What criterion, or combination of criteria, should adjudicators rely upon in determining the end of the SARS-Cov-2 emergency: biological or social; subjective, as determined by the authorities of each state, or objective; domestic emergency, by reference to the epidemic in a specific state, or international emergency, by reference to the pandemic? Furthermore, and considering this last point, how should tribunals analyze a local emergency against the background of a world crisis?<sup>75</sup> And lastly, by which yardstick can they decide that emergency measures are no longer needed?

<sup>68</sup> DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARDS OF REVIEW AND MARGIN OF APPRECIATION 8 (Lukasz Gruszczynski & Wouter G. Werner eds., 2014).

<sup>69</sup> Jorge E. Viñuales, *Defence Arguments in Investment Arbitration*, in 18 ICSID REPORTS, paras. 69–72 (Jorge E. Viñuales & Michael Waibel eds., 2020).

<sup>70</sup> GROSS & AOLÁIN, *supra* note 1, at 174–80.

<sup>71</sup> *E.g.*, JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at ix (2012) (“an endless war, and an endless emergency too”).

<sup>72</sup> Stephen M. Kissler, Christine Tedijanto, Edward Goldstein, Yonatan H. Grad & Marc Lipsitch, *Projecting the Transmission Dynamics of SARS-Cov-2 Through the Postpandemic Period*, 368 SCI. 860 (2020).

<sup>73</sup> Fifth EC Meeting, *supra* note 48.

<sup>74</sup> GROSS & AOLÁIN, *supra* note 1, at 283 (“structural inability to deal credibly with permanent emergencies”).

<sup>75</sup> Among others, these decisions mention, but do not analyze the global-local interface. *Affaire Mamatas et Autres c. Grèce*, App. No. 63066/14, para. 101 (Eur. Ct. H.R. July 21, 2016); *Poštová Banka and Istrokapital v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, para. 46 (Apr. 9, 2015), and Annulment, para. 19 (Sept. 29, 2016); *Theodoros Adamakopoulos v. Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction (Feb. 7, 2020); *Khalifa and Others v. Italy*, App. No. 16483/12 (Eur. Ct. H.R. Dec. 15, 2016).

It is perhaps simplistic to think that emergency measures must end when the emergency ends: the emergency may have ended only *because* those measures remain in place, but the threat may still loom large—a possibility that the IHR and the European human rights system acknowledge.<sup>76</sup> Both allow the continuation of certain measures even after an emergency is over, subject to certain conditions. This is a particularly important consideration in potential claims arising out of SARS-Cov-2 due, first, to the interaction between the domestic and the global pandemic, since the end of a national epidemic and the related domestic emergency may occur against the looming threat of a continued global pandemic, as the case of New Zealand shows, and, second, given the possibility of (some) COVID-19 disease becoming the new normal. In both cases, certain measures may need to continue even past the end of the emergency.

Our exploratory analysis shows that there are no developed answers to many of the questions in this Essay, suggesting that more work remains to be done to conceptualize the end of emergencies and their implications in international law.<sup>77</sup>

<sup>76</sup> Alan Greene, *Derogating from the European Convention on Human Rights in Response to the Coronavirus Pandemic: If Not Now, When?*, 3 EUR. HUM. RTS. L. REV. 262 (2020).

<sup>77</sup> GROSS & AOLÁIN, *supra* note 1, 283.